Supreme Court, U.S.
FILED
OCT 27 2009
OFFICE OF THE CLERK

No. 09-308

IN THE

Supreme Court of the United States

U-HAUL CO. OF CALIFORNIA,

Petitioner,

v.

CITY OF BERKELEY, CITY COUNCIL OF THE CITY OF BERKELEY, LINDA MAIO, DARRYL MOORE, MAXWELL ANDERSON, DONA SPRING, BETTY OLDS, KRISS WORTHINGTON, AND GORDON WOZNIAK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
I. U-Haul Has Properly Asserted a Federal Claim	1
II. The Questions Presented by U-Haul Were Not Settled in *County of Sacramento v. Lewis*	4
III. Permit Revocations Are Not and Should Not Be Treated Differently Depending on Whether a Revocation is Based on Nuisance Abatement or Conditions Violations	7
IV. The City Did Not Properly Consider Other Remedies	10
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases

Chavez v. Martinez,
538 U.S. 760 (2003) 6

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 4, 5, 6, 8

Crider v. Bd. Of County Commissioners of the County of Boulder,
246 F.3d 1285 (10th Cir. 2001) 7

Dewey v. City of Des Moines,
173 U.S. 193 (1899) 3, 4

Illinois v. Gates,
462 U.S. 213 (1983) 3

Khan v. Gallitano,
180 F.3d 829 (7th Cir. 1998) 5

Korean American Legal Advocacy Foundation v. City of Los Angeles,
23 Cal.App.4th 376 (1994) 1, 2, 3, 11

Lawton v. Steele,
152 U.S. 133 (1894) 1, 2, 3, 11

Moreland v. Las Vegas Metropolitan Police Dept.,
159 F.3d 365 (9th Cir. 1998) 5, 6

Cited Authorities

Page

North Pacifica LLC v. City of Pacifica,
526 F.3d 478 (9th Cir. 2008) 7

O'Hagen v. Board of Zoning Adjustment,
19 Cal.App.3d 151 (1971) 1, 9, 10

Pearson v. City of Grand Blanc,
961 F.2d 1211 (6th Cir. 1992) 6

Picard v. Connor,
404 U.S. 270 (1971) 4

Spoklie v. Montana,
411 F.3d 1051 (9th Cir. 2005) 7

Taylor v. Illinois,
484 U.S. 400 (1988) 2

Trans-Oceanic Oil Corp. v. Santa Barbara,
85 Cal.App.2d 776 (1948) 9

U.S. v. Stein,
495 F.Supp.2d 390 (S.D.N.Y. 2007) 6

Village of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 7, 8, 9

Weatherford ex rel. Michael L. v. State,
206 Ariz. 529 (2003) 6

Cited Authorities

Page

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I. U-Haul Has Properly Asserted a Federal Claim

The City is incorrect in its assertion that U-Haul did not raise a federal claim before the California courts. To the contrary, the record shows that U-Haul has consistently made the federal substantive due process claim from the outset of the action.

In U-Haul's initial Petition for Writ of Mandate filed in response to the permit revocation, U-Haul specifically and distinctly alleged substantive due process violations under the Due Process Clause of both the federal and state constitutions: "The revised resolution violates the *Due Process Clause of the state and federal constitutions* by revoking U-Haul's Use Permit without following the appropriate administrative procedures and in violation of U-Haul's *substantive Due Process rights.*" Clerk's Transcript at 6 [emphasis added].

In its brief in support of the Petition, U-Haul cited to two California cases (*Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal.App.4th 376 (1994) and *O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151 (1971)), *both* of which discuss the due process standard (in relevant land use / permit revocation contexts) first articulated in *Lawton v. Steele*, 152 U.S. 133 (1894), and *both* of which cite to *Lawton* as the source of the standard. U-Haul made the same argument to the appellate court, using *Korean American* and *O'Hagen* as vehicles for due process analysis under the *Lawton* test. U-Haul did not explicitly or implicitly abandon its federal due process allegations at the appellate level. Utilizing the *Korean American* decision did not mean that U-Haul was confining its

argument to California law; rather, *Korean American* represents an iteration of the much more fundamental *Lawton* test as applied in permit revocation contexts, and is therefore highly applicable to the current action.

This scenario is similar to that in *Taylor v. Illinois*, 484 U.S. 400 (1988), where this Court held that a due process claim was "sufficiently well presented to the state courts to support [the Court's] jurisdiction." The *Taylor* Court found that "although petitioner expressly asserted only a due process violation, his reliance on the Sixth Amendment was clear. He cited and relied upon, *through a quotation from an Illinois Appellate Court decision*, two of our Compulsory Process Cases." *Id.* at 406, n. 9 [emphasis added]. Here, U-Haul has done more – it has explicitly asserted a due process violation under the Due Process Clause of the Constitution *and* cited to relevant cases which articulate the due process standard that U-Haul advocates.

Indeed, the appellate court itself cited *Lawton* in connection with the due process standard in its decision, which devoted several paragraphs to U-Haul's substantive due process argument and the scope of "the protections of due process prior to [a] permit's revocation." Appendix at 16a-18a. This demonstrates that the appellate court understood that *Korean American* was meant to reach the fundamental due process standard of the federal Constitution.

As the Court of Appeal erred regarding the application of the *Lawton* due process standard to permit revocations based on violations of permit conditions, U-Haul petitioned the California Supreme

Court on that issue. In the Petition for Review, U-Haul focused on the very cases that the Court of Appeal used in its analysis of the due process standard, again referring to *Lawton* and *Korean American* and again emphasizing the *Lawton* standard as the appropriate method of review in all permit revocation cases. This consistent position by U-Haul demonstrates that this issue does not arise from "passing invocations of due process," as the City would argue.

Further, as the entire California Supreme Court Petition was centered on this lone issue, it was only natural – and completely appropriate – for U-Haul to expand on its original argument. Indeed, this Court has held (in the context of Supreme Court review of state court decisions) that an enlargement of questions presented in lower courts is permissible: "Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899). *See also Illinois v. Gates*, 462 U.S. 213, 219-220 (1983). "If the question were only an enlargement of the one mentioned in the assignment of errors . . . we should have no hesitation [in permitting] the question to be . . . argued." *Dewey*, 173 U.S. at 197-198. At any rate, U-Haul very explicitly reiterated to the California Supreme Court that its substantive due process claim was federally based.

Ultimately, "no particular form of words is necessary to be sued in order that the federal question may be said to be involved." *Dewey v. City of Des Moines*, 173 U.S. 193, 199 (1899). "In order to be available in this court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right

founded it in some degree upon the constitution or laws or treaties of the United States." *Id.* at 199-200. *See also Picard v. Connor*, 404 U.S. 270, 278 (1971) (the raising of a federal claim does not require "book and verse [citation to] the federal constitution," but rather the "substance" of a federal claim). Here, U-Haul has exceeded this standard by explicitly alleging, in its First Cause of Action in its initial petition for writ of mandate, that its substantive due process rights under the Due Process Clause of the federal Constitution were violated in the permit revocation process and by consistently arguing for the application of the *Lawton* due process standard in its briefs, at every judicial level.

II. The Questions Presented by U-Haul Were Not Settled in *County of Sacramento v. Lewis*

The City is also incorrect in its presumption that *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) is controlling in this case. While it is true that *Lewis* applies a "shocks the conscience" test in a substantive due process context, the case is limited to its facts and is far from the definitive word on the entire body of substantive due process law. Further, academics and commentators still observe, post-*Lewis*, that, with respect to land use, "federal courts differ in their handling of substantive due process claims." Ziegler, Rathkopf, and Rathkopf, *Rathkopf's The Law of Zoning and Planning*, § 3:3 (2009).[1] This observation is borne out by examining the wide scope of substantive due process law and its treatment in the various federal (and state) courts.

1. U-Haul cited to such recent commentary in its Petition for Certiorari. *See* Petition at 17.

In *Lewis*, the Court expressly confined itself to a narrow issue:

> "The issue in this case is whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. We answer no, and hold that *in such circumstances* only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."

Lewis, 523 U.S. at 836 [emphasis added]. The Court continued by stating that "preserving the constitutional proportions of substantive due process demands an exact analysis of [the] circumstances," indicating that the analysis conducted in *Lewis* did not and could not apply in other contexts.

Other courts concur. "[The *Lewis* Court] made clear that its shocks-the-conscience analysis was not generally applicable to all substantive-due-process claims." *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999). "[T]he Supreme Court limited its holding in *Lewis* to the facts of that case." *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365, 372 (9th Cir. 1998).[2] *See also*

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2. *Moreland*, like *Lewis*, involved non-deliberative, quick action by police officers taken in the course of their (Cont'd)

U.S. v. Stein, 495 F.Supp.2d 390, 411 (S.D.N.Y. 2007) ("It is not clear that the Supreme Court still adheres to the *County of Sacramento* framework.") (citing to *Chavez v. Martinez*, 538 U.S. 760 (2003) and several Second Circuit substantive due process cases); *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 533 (2003) ("Neither the Supreme Court nor the Ninth Circuit has clearly defined when executive conduct becomes "arbitrary in the constitutional sense" so as to impose individual § 1983 [substantive due process] liability in the foster care context.").[3] Moreover, the City belies its own argument that *Lewis* has already addressed the issue U-Haul presents here by stating that "this Court rejected the notion that substantive due process analysis must be fixed with rigid parameters in *County of Sacramento*." Opposition at 18.

Despite the City's contention that *Lewis* has provided finality regarding the appropriate substantive due process test, the disparity among the various federal districts that U-Haul discussed through reference to *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) is still present today, post-*Lewis*.

(Cont'd)
peacekeeping duties (*Lewis* involved a high-speed vehicle chase through residential streets, *Moreland* involved police intervention in an ongoing gunfight which threatened dozens of bystanders). In such situations, perhaps a "shock the conscience" test is appropriate. This standard, however, is not appropriate for more calculated, lengthy governmental decisions.

3. This Court itself has suggested that the "shocks the conscience" test is a flawed, subjective one. *See Lewis*, 523 U.S. at 860-862 (Scalia, J., concurring).

For example, *see Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005) (applying "arbitrary and unreasonable" and "substantial relation to the public health, safety, morals, or general welfare" tests, derived from *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in challenge to a state statute related to ownership of certain types of livestock).[4] *See also Crider v. Bd. of County Commissioners of the County of Boulder*, 246 F.3d 1285, 1289-1290 (10th Cir. 2001) (applying "reasonably conceivable" test where local cities and counties placed private land in "rural preservation zone").

Ultimately, U-Haul's citation to *Lewis* is illustrative of the fact that many different standards of substantive due process analysis – corresponding to the many different contexts in which due process concerns arise – have been promulgated by this nation's courts and that the question of the appropriate standard of analysis in land use – and, more specifically, use permit revocations – has not been settled.

III. Permit Revocations Are Not and Should Not Be Treated Differently Depending on Whether a Revocation is Based on Nuisance Abatement or Conditions Violations

The City's claim that U-Haul cannot support its due process argument with case law determined in the context of nuisance abatement and other "distinct situations" is inaccurate. The City fails to cite a single

4. The Ninth Circuit has also applied this test in land use and zoning cases. *See North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008).

case to support its allegation that "the fundamental natures of nuisance abatement and permit revocation are substantially different" and misstates case law that purportedly provides support for its claim that "courts have properly recognized a distinction between actions involving nuisance abatement and permit revocations." Opposition at 22, 23.[5] Neither federal law nor California law draws such distinctions in the context of challenges to government regulation of property interests.[6]

First, this Court has long recognized the similarities between nuisance law and land use and zoning regulations. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court consulted the law of nuisances "for the helpful aid of its analogies in the process of ascertaining the scope of" permissible land use regulation. *Id.* at 387-88. Thus, as this Court declared,

> "the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract

5. Further, the City's arguments regarding notice might be applicable to discussions of *procedural* due process, but are immaterial to the present issue.

6. The validity of the City's attempt to color U-Haul's case citations as "inapposite" is also blatantly contradicted by its own reliance on a factually distinct case – *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *Lewis* has no factual similarities to land use regulation or zoning in general, let alone permit revocation.

> consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality."

Id. at 388. In addition, both nuisance and land use laws find their basis in the state's lawful exercise of its "police power," which "is universally conceded to include everything essential to the public safety, health, and morals . . ." *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

Second, the City's string citations do not provide authority for its attempt to distinguish "nuisance abatement" from "permit revocation." The City relies on *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal.App.2d 776 (1948) and several other cases that stand for the proposition that a permit *may* be revoked when its conditions are not followed. U-Haul does not and has never contended that a municipality may never revoke a permit based on conditions violations; rather, U-Haul contends that municipalities are required, per the strictures of due process, to adopt less drastic remedies whenever they can feasibly achieve the same goal – otherwise, property rights are unduly abused. These cases offer nothing to refute this contention. *O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151 (1971), on the other hand, states that

> "*in each instance*, in order to justify the interference with the constitutional right to carry on a lawful business it *must* appear that the interests of the public generally require such interference and that the means are

> reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals."

Id. at 158 [emphasis added]. This rule does not distinguish between nuisance and conditions violations.

IV. The City Did Not Properly Consider Other Remedies

The City's argument that "considerable thought" was given to alternate remedies is also flawed. First, the fact that some of the zoning board members recommended "restating . . . what the Use Permit says" and giving U-Haul "30 days to conform" does not show meaningful consideration of feasible alternate remedies, nor does it show meaningful consideration of the staff report's recommendation to impose specific *additional* conditions on the permit. To the contrary, the *very first* comment during the zoning board's discussion was to move to recommend that the City Council revoke the use permit. Administrative Record at 139. Moreover, when a board member vaguely referred to the staff recommendation, another board member quickly stated "We're not talking about adding additional conditions. Your recommendation is that we revoke this permit . . ." *Id.* at 143. At no time were the *actual* recommendations themselves *mentioned*, let alone considered.[7] This lack of deliberation continued at the subsequent City Council meeting, where the

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7. Indeed, a board member states that "I've only suggested, without knowing the wording, that I would be comfortable with supporting the staff recommendation . . ." This ignorance as to the actual recommendation clearly demonstrates a lack of meaningful consideration.

recommendations again went unmentioned. The California courts also failed to inquire into alternate, less drastic remedies in their review of the City's revocation proceedings.

Second, the City's emphasis on *consideration* of less feasible remedies misses the import of the *Korean American* decision, which states that "Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible." *Korean American*, 23 Cal.App.4th at 391, n. 5. The important point, then, is that the City *should have chosen* a less strict remedy if it was capable of being effective. Mere discussion of any lesser remedy is insufficient. It is by adherence to the *Korean American* standard that the *Lawton* due process principles are properly followed. The record shows that lesser remedies would have been feasible (as determined in the staff report). Further, the decision-making bodies in the City never did demonstrate, with reasonable reference to *actual alternative proposals*, the infeasibility of those (or any other) remedies. Therefore, the City failed to adhere to the standard articulated in *Korean American* and the *Lawton* due process standard.

CONCLUSION

For the foregoing reasons, and as described in U-Haul's opening brief, U-Haul respectfully requests that this Court grant certiorari and resolve the questions presented.

Respectfully submitted,

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